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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 17.05.2023

\+ **BAIL APPLN. 2076/2019**

FRANK CHIDI NWABUGW ..... Petitioner

Through: Mr. Varun Dev Mishra, Advocate

versus

NARCOTICS CONTROL BUREAU ..... Respondent

Through: Mr. Utsav Bains, SPP with Mr. Sunil Kumar, Advocate

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.*(ORAL)*

1. By way of instant application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), the applicant seeks regular bail in Case No. NCB/VIII/10/DZU/2018 registered at Police Station Narcotics Control Bureau under Sections 21(c)/23(c)/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. The case of prosecution, in brief, is that on the basis of secret information received, co-accused persons namely Raimundo Jorge Cabral Trindade and Lima Jefferson, both citizens of Brazil, were searched on 16.04.2018 at Hotel Hare Rama Guest House, Paharganj, New Delhi and 2.650 kg of liquid cocaine was recovered from their

possession. As per prosecution, the accused persons in their statements under Section 67 NDPS Act had disclosed that the drug consignment was given to them by EDU in Sao Paulo alongwith journey ticket and they had been asked to hand over the same to one Nigerian national Frank i.e. present applicant, who resides in Mumbai and would collect the same from the Hotel or outside Hotel on 17.04.2018. In compliance with the above statements, information was reduced into writing and surveillance was mounted near the Hotel. It is alleged that on 17.04.2018 at about 8:30 PM, the trap team had seen the present accused roaming near the Hotel and upon being apprehended, he had revealed his name as Frank Chidi Nwabugwbu and had stated that he had come to receive the drugs. In his disclosure statement, the applicant disclosed that he had visited the spot to receive drugs from the other two accused persons on the asking of one Onyeisi Nchuaja and that he had to further hand over the same to one Onyka in Mumbai.

3. Learned counsel for the present accused/applicant submits that applicant was arrested on 18.04.2018 and has been in judicial custody since then. It is stated that the present application is not being pressed on merits but only on the ground that since the applicant has been in judicial custody for more than 5 years, he will be entitled to bail in view of decision of Hon'ble Apex Court in ***Satender Kumar Antil v. Central Bureau of Investigation*** *(2022) 10 SCC 51* and ***Supreme Court Legal Aid Committee (Representing undertrial prisoners) v. Union of India*** *(1994) 6 SCC 731*. It is stated that considering the duration of custody of the applicant and the fact that there is a delay in trial, the present application be allowed. Reliance has also been placed on several

judgments of Hon'ble Apex Court as well as this Court where bails have been granted under such circumstances.

4. Learned SPP for NCB, on the other hand, opposes the present bail application and argues that present case is of recovery of commercial quantity of contraband. It is stated that applicant is a foreign national and thus, chances of absconding cannot be ruled out. It is also stated that applicant was in possession of a fake/forged passport and visa, and thus, he was residing in India without any valid passport and visa. It is also stated that even the SIM card which was being used by the applicant was obtained by using forged ID card. It is, thus, argued that the present application be dismissed in view of the serious allegations against the applicant.

5. I have heard arguments addressed by both sides and have perused the case file.

6. The allegations against the present applicant are that he was apprehended from the spot where he had come to receive a drug consignment from the co-accused persons. He is also alleged to have been in possession of fake passport and visa which he had used to travel to India. Further, he had also provided a fake residential address in Mumbai and even the SIM card being used by the applicant had been obtained on the basis of a forged ID card. The consignment of contraband which had been seized by the investigating agency was 2.650 kg of liquid cocaine, which is a commercial quantity. In view thereof, the bar under Section 37 of NDPS Act would apply. As far as law under Section 37 is concerned, it will be apt to refer to the

following observations of Hon'ble Apex Court in ***Narcotics Control Bureau v. Mohit Aggarwal*** *2022 SCC OnLine SC 891*:

> "...10. The provisions of Section 37 of the NDPS Act read as follows:
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> "[37. Offences to be cognizable and non-bailable.-
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> (1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974) -
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> (a) every offence punishable under this Act shall be cognizable;
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> (b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless -
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> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
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> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]
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> 14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

> 15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail."

7. However, during the course of arguments, learned counsel for the applicant did not seek grant of regular bail on merits, rather contended that the applicant be enlarged on bail taking into account the duration of his custody and delay in trial.

8. In this regard, this Court notes that the applicant was arrested on 18.04.2018 and has been in judicial custody for about 5 years and 01 month. Further, the applicant is facing trial in a case where he has been accused of commission of offences under Sections 21/23/29 of NDPS Act. This Court notes that the punishment prescribed under these provisions is rigorous imprisonment for a term which shall not be less than ten years but may extend to twenty years, alongwith fine. In such category of cases, the directions of Hon'ble Apex Court in ***Supreme Court Legal Aid Committee*** *(supra)* provide as under:

> "15. ...We, therefore, direct as under:
>
> (i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence

providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bailamount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) **Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount**.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the **undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least** once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and **once in a week in the case of those covered by**

clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) **in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required**;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violatedor a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code..."

(Emphasis supplied)

9. The aforesaid decision of Hon'ble Apex Court was reiterated and affirmed in ***Thana Singh v. Central Bureau of Investigation*** *(2013) 2 SCC 590* as well as in ***Union of India v. K.A. Najeeb*** *(2021) 3 SCC 713*. Further, Hon'ble Apex Court while summarizing the law on grant of bail under different circumstances, has held in ***Satender Kumar Antil*** *(supra)* as under with regard to applicability to Section 436A of Cr.P.C. viz. a viz. Section 37 of NDPS Act:

> "86. Now we shall come to category (C). We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigor imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigor as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigor, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code."

10. Most recently, the Hon'ble Supreme Court in ***Mohd. Muslim v. State (NCT of Delhi)*** *2023 SCC OnLine SC 352* had also reiterated and affirmed the aforementioned decisions while considering grant of bail under NDPS cases

11. This Court *vide* order dated 28.02.2023 had also sought a report from the learned Trial Court as to how much more time would be required to conclude the trial. A letter dated 20.03.2023 has been received from the learned Trial Court whereby it has stated that present matter is at the stage of evidence and two witnesses have been examined while two witnesses have been dropped, out of total 17 witnesses. It is also stated that in view of large pendency of time bound matters including those which are older than the present case, a time of two years may be granted to complete the trial in present case. However, the learned Trial Court has also informed that it has 23 more matters which are time bound on the directions of this Court and Hon'ble Supreme Court and, therefore, the trial is taking time.

12. In view thereof, the learned District and Sessions Judge concerned is directed to ensure that there is equal distribution of time bound matters also, as deemed appropriate by him, and he may look into this matter since a letter has already been written by the concerned Judge also to the learned District and Sessions Judge. This will go a long way in ensuring that there is an expeditious trial in all the time bound cases and one judicial officer is not burdened with the majority of time bound matters.

13. As far as present application is concerned, without going into the merits of the case and material against the applicant, and considering the duration of the custody and the fact that only two witnesses have been examined as of now and the learned Trial Court has itself sought time of two years to conclude the trial, this Court is inclined to grant regular bail to the present accused/applicant on furnishing a personal bond in sum of Rs.1,00,000/- (Rupees One Lakh) with two sureties of like amount to the satisfaction of Trial Court/ Duty Magistrate/ Link Magistrate/ Successor Court, on following terms and conditions:

a) The applicant shall deposit his Passport with the learned Trial Court and shall not leave the country;
b) The learned Trial Court shall ensure that the certificate of assurance from the High Commission of Nigeria duly verified is placed on record that the applicant shall not leave the country;
c) The applicant shall not leave NCT of Delhi, except with the prior permission of learned Trial Court;
d) The applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing;

e) The applicant shall provide his address to the learned Trial Court by way of an affidavit and in case of any change in address, he shall promptly inform the same to the concerned Court;

f) The applicant shall provide his mobile number to the Investigating Officer concerned, which shall be kept in working condition at all times and he shall not switch off or change the mobile number without prior intimation to the IO concerned;

g) The applicant shall report at the concerned Police Station once in every week, on Wednesday, between 10:00-11:00 am;

h) The applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, or tamper with the evidence of the case.

14. Accordingly, the present application stands disposed of.

15. A copy of this order be forwarded to the learned Trial Court as well as learned District and Sessions Judge, Patiala House Courts, Delhi.

16. The order be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 17, 2023/zp